WAN MOHD RAFAIN WAN ISMAIL

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL FCJ
[CRIMINAL APPEAL NO: 41-60-2000]
9 SEPTEMBER 2005

CRIMINAL LAW: *Penal Code - Section 336 - Endangering human life or personal safety of others - Ingredients - Mens rea - Rashly or negligently - Deliberate acts, whether excluded - Whether s. 336 excludes deliberate acts done with intent - Proof and sufficiency of evidence adduced by prosecution*

CRIMINAL LAW: *Police Act 1967 - Section s. 27(5) - Unlawful assembly - Defence - 'Innocent circumstances' - Section 27(5B) - Finding of magistrate, whether supported by the evidence - Whether a misdirection*

The accused was charged with two offences, one under s. 336 of the Penal Code ('PC') for endangering human life or the personal safety of others, and the other under s. 27(5) of the Police Act 1967 ('PA') for unlawful assembly. At the conclusion of the trial, the magistrate found the accused guilty and convicted him on both charges and sentenced him to three months' imprisonment in respect of each charge. This was the accused's appeal to the High Court against his conviction and sentence.

Held (allowing the appeal):

[1a] To establish a charge under s. 336 of the PC, the prosecution must prove that the accused committed the act in question, either rashly or negligently – as opposed to deliberately, and that such an act did endanger human life or the personal safety of others. "Section 336 has **no** application where the act is directed to the causing of positive harm as in the case of an assault. It only applies when the act is done rashly or negligently and with **no** intent or knowledge to injure someone in particular or humanity in general." (pp 237 c-h & 238 a-d)

[1b] The magistrate here had merely set out the evidence adduced by the prosecution without considering the ingredients of the offence that had to be proved. There was no evidence to show that the accused's alleged act of throwing stones at the FRU personnel was one that was rash,

nor was it shown that such an act had endangered human life or the personal safety of others. The evidence on record was insufficient to support a *prima facie* case against the accused and he ought not, therefore, to have been called upon to enter on his defence. (p 238 e-f)

[2] The accused's contention that his 'presence at the assembly came about through innocent circumstances' was a defence to the charge under s. 27(5) as provided for under s. 27(5B) of the PA. The finding of the magistrate that the accused's defence in this regard was an 'afterthought' was **not** supported by the evidence; it was a misdirection. (pp 239 b-h & 240 a-d)

[Convictions and sentences imposed quashed; accused acquitted and discharged.]

Case(s) referred to:
Canalla v. Emperor AIR [1932] All 322 ***(foll)***
Gaya Prasad v. Emperor [1928] 29 Cr LJ 1088 ***(foll)***
Mahadeo Pandy v. Emperor AIR [1932] All 322 ***(refd)***
Mahendra v. State [1954] ILR 33 Pat 1006 ***(foll)***
Maung Ba Kyi v. Emperor [1937] 38 Cr LJ 897 ***(foll)***
Ng Eng Huat v. PP [1988] 1 MLJ 417 ***(foll)***
Queen Empress v. Nga Tha Kaing Ku [1872-92] LBR 91 ***(refd)***

Legislation referred to:
Penal Code, s. 336
Police Act 1967, s. 27(5), (5B)

Penal Code [India], s. 336

For the apellant - Edmund Bon (Amer Hamzah Arshad with him); M/s Chooi & Co
For the respondent - Mohamad Abazafree Mohd Abbas DPP

Reported by Gan Peng Chiang

JUDGMENT

Augustine Paul FCJ:
In this case two charges were preferred against the accused in the Magistrates' Court at Kuala Lumpur. They are:

First Charge

Bahawa kamu pada 17-4-1999 jam lebih kurang 4.15 petang, di Jalan Pudu, di dalam daerah Dang Wangi, Wilayah Persekutuan, Kuala Lumpur, telah membaling batu ke arah anggota-anggota Unit Simpanan Persekutuan (FRU) di mana perbuatan itu dengan sebegitu gopoh hingga membahayakan keselamatan diri anggota-anggota Unit Simpanan Persekutuan (FRU) tersebut. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 336 Kanun Kesiksaan dan boleh dihukum di bawah Seksyen yang sama.

Tuduhan Kedua

Bahawa kamu pada 17-4-1999 jam lebih kurang 4.15 petang, di Jalan Pudu, di dalam daerah Dang Wangi, Wilayah Persekutuan, Kuala Lumpur, telah dijumpai di dalam satu perhimpunan haram (unlawful assembly) dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 27(5) Akta Polis 1967 (Akta 344) yang boleh dihukum di bawah Seksyen 27(8) Akta yang sama.

He claimed trial. He was found guilty on both the charges. Upon conviction he was sentenced to three months' imprisonment in respect of each of the two charges. In addition a fine of RM2,500 was imposed in respect of the second charge and, in default of payment of the fine, three months' imprisonment. He appealed against both the convictions and sentences. On his application both the sentences were stayed pending the appeal.

The prosecution called four witnesses in support of its case while only the accused gave evidence in support of the defence. The case for the prosecution as found by the learned Magistrate in her grounds of judgment reads as follows:

Pertama, SP1 memberi keterangan sewaktu kes pendakwaan bahawa beliau telah melihat sekumpulan 20 orang berada dalam satu perhimpunan haram dan sedang membaling batu ke arah anggota FRU. SP1 telah mengecam OKT sebagai salah seorang yang berada dalam perhimpunan tersebut yang juga sedang membaling batu ke arah anggota FRU. SP1 telah mengejar kumpulan tersebut dan berjaya menangkap OKT.

SP2 juga memberi keterangan yang sama, bahawa beliau telah melihat OKT membaling batu ke arah anggota FRU lebih kurang 15 minit. Kumpulan tersebut tidak bersurai apabila disuruh bersurai oleh FRU. SP2 menyatakan OKT telah lari apabila melihat polis mengejar mereka, dan bukan sebab bersurai.

Kedua, SP3 mengesahkan bahawa tiada permit dikeluarkan untuk sebarang perhimpunan pada hari itu ditempat dan waktu yang sama seperti kejadian kes ini.

The case for the defence as found by the learned Magistrate reads as follows:

> OKT di dalam pembelaannya menyatakan bahawa beliau telah membeli tikit untuk pulang ke kampungnya di Kelantan bertarikh 17-4-1999 jam 9.30 malam. Pada hari tersebut, jam 12.00 tengahari OKT telah keluar dari rumahnya di Segambut dan telah pergi ke Central Market, Kota Raya dan seterusnya ke Pudu Raya. Di situ, OKT telah melihat ramai orang yang berkumpul dan beliau telah menghampiri untuk mengetahui apa yang berlaku. OKT memberitahu beliau ada melihat trak-trak FRU dan juga anggota FRU.
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> OKT menyatakan bahawa beliau telah duduk di tepi jalan untuk melihat apa yang berlaku. Pihak FRU telah memberi arahan untuk bersurai dan juga telah memancutkan air kepada orang ramai yang berkumpul. Orang ramai mula berlari dan dikejar oleh anggota FRU dan ada yang berlari ke arah OKT. OKT juga telah berlari dan telah ditangkap.
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> OKT memaklumkan bahawa beliau tidak ada niat untuk menyertai perhimpunan tersebut. Juga beliau tidak tahu perhimpunan itu haram. OKT menafikan beliau telah membaling batu kepada anggota FRU.
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> Semasa soal balas, OKT mengaku berada di tempat kejadian tersebut. Juga terhadap soalan oleh pegawai pendakwa, OKT mengakui bahawa beliau tidak membawa apa-apa beg pakaian ketika itu kecuali beg duit. OKT bercadang untuk pulang ke rumahnya jam 6.00 petang untuk mengambil beg pakaian, dan akan meminta kawannya menghantarnya ke stesen bas.
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> Di dalam hujahannya, pihak pembelaan menyatakan pada hari tersebut, OKT telah pergi bersiar-siar di kompleks membeli-belah di sekitar tempat kejadian jam 12.00 tengahari. OKT telah bercadang untuk pulang ke kampung jam 9.30 malam. Apabila melihat ramai orang berkumpul di tempat kejadian, atas perasaan ingin tahu, OKT telah mendekati himpunan tersebut. Dalam keadaan kelam-kabut di mana orang ramai melarikan diri, ramai orang telah ditangkap, termasuk OKT.

In finding the accused guilty the learned Magistrate said:

> Ketiga, pembelaan OKT bahawa beliau telah membeli tiket untuk pulang ke kampung pada malam itu adalah satu 'afterthought'. Ini adalah kerana alasan ini tidak dinyatakan kepada pegawai penyiasat ketika siasatan dijalankan. Juga tiket yang dikemukakan tidak dapat dibuktikan sebagai kepunyaan OKT. Semasa kejadian, OKT tidak membawa apa-apa beg pakaian untuk berjalan jauh. OKT menyatakan meminta kawannya untuk menghantarnya ke stesen bas, tapi kawannya itu tidak dipanggil sebagai saksi untuk menyokong kenyataan OKT itu.
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> Berdasarkan alasan-alasan di atas, mahkamah berpuas hati bahawa pihak pendakwaan telah berjaya membuktikan kedua-dua pertuduhan terhadap OKT tanpa sebarang keraguan yang munasabah. Oleh itu OKT didapati bersalah dan disabitkan dengan kedua-dua pertuduhan.

I shall now consider the validity of the finding of the learned Magistrate on both the charges.

The First Charge

This charge is under s. 336 of the Penal Code ("s. 336"). It reads as follows:

> Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred ringgit, or with both.

The ingredients which require proof for a charge under this section are that

(a) the accused did the act in question,

(b) he did it rashly or negligently, and

(c) the act was such as would endanger the life or personal safety of others.

It is therefore clear that quite apart from the fact that the accused did the act in question the prosecution must also prove that he did it rashly or negligently and that the act was such as would endanger the life or personal safety of others (see *Queen Empress v. Nga Tha Kaing Ku* [1872-92] LBR 91). A rash or negligent act is not one that is done with deliberation. In commenting on the facts that constitute a rash act Das J said in *Mahendra v. State* [1954] ILR 33 Pat 1006 at p. 1008:

> A rash act is primarily a hasty act, and is thus opposed to a deliberate act. Of course, a rash act is also a voluntary act. An act done voluntarily may be a rash act, if it is done without due deliberation and caution. Where, however, a person deliberately throws stones into the quarters of another person, he does the act not rashly but deliberately in an attempt to cause hurt to some inmate or other of the quarters.

Similarly Dalal J said in *Gaya Prasad v. Emperor* [1928] 29 Cr LJ 1088:

> A rash act is primarily an overhasty act and is opposed to a deliberate act. Given if it is partly deliberate, it is done without due thought and caution. Here there is no question of want of thought or want of caution. The applicant desired a certain result to follow from the throwing of bricks and he deliberately threw the bricks at the temple for that purpose.

In *Ng Eng Huat v. PP* [1988] 1 MLJ 417 it was held that the deliberate act of reversing a car into another car was not a negligent act within the meaning of s. 336. There must also be evidence to show that the rash or negligent act was such as would endanger the life or personal safety of others. Section

336 has no application where the act is directed to the causing of positive harm as in the case of assault. It only applies when the act is done rashly or negligently but not with intent or knowledge to injure someone in particular or humanity in general (see *Canalla v. Emperor* AIR [1941] All 288). It is not necessary that the act should have actually caused hurt or injury to human life, for the offence consists in endangering human life, not in causing injury (see *Mahadeo Pandy v. Emperor* AIR [1932] All 322). Where there is no proof of the three ingredients a charge under s. 336 cannot be sustained. Thus in *Maung Ba Kyi v. Emperor* [1937] 38 Cr LJ 897 Spargo J in setting aside a conviction under s. 336 of the Indian Penal Code, similar to ours, said at pp. 897-898:

> I am of opinion that this conviction must be set aside for three reasons:
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> (i) that the firing of this gun was not a rash and negligent act but a deliberate act, therefore, s 336, Indian Penal Code, had no application;
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> (ii) there was no proof that human life was actually endangered; and
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> (iii) that *prima facie* no offence was committed because the gun was fired merely to warn the people who were throwing stones and not with the object of hitting them.

The first observation to be made is that the learned Magistrate had merely set out the evidence adduced by the prosecution without a consideration of the ingredients of the offence that require to be proved. If she had embarked upon such an evaluation she would have realised that the only evidence adduced by the prosecution was that the accused was one of a group of persons throwing stones at the FRU personnel. No evidence was adduced to show that the act of throwing the stones by the accused was rash. Neither was any evidence adduced to show that the act was such as would endanger the life or personal safety of others. In the circumstances the evidence on record is insufficient to support a *prima facie* case against the accused. Accordingly, he ought not to have been called upon to enter his defence.

The Second Charge

This charge is under s. 27(5) of the Police Act 1967. It reads as follows:

> Any assembly, meeting or procession:
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> (a) which takes place without a licence issued under sub-s (2); or
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> (b) in which three or more persons taking part neglect or refuse to obey any order given under sub-s (1) or sub-s (3),

> shall be deemed to be an unlawful assembly, and all persons attending, found at or taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued all persons attending, found at or taking part of concerned in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence.

In substance the defence of the accused was that he was found in the assembly in innocent circumstances. This is a defence to the charge as provided by s. 27(5B) of the Police Act 1967. It reads as follows:

> In any prosecution for an offence under subsection (5) of attending or being found at an assembly, meeting or procession which is an unlawful assembly, it shall be a defence that the presence of the person charged came about through innocent circumstances and that he had no intention to be otherwise associated with the assembly, meeting or procession.

The learned Magistrate rejected the defence of the accused on four grounds. Firstly, the evidence of the accused that he had bought a ticket to return home is an afterthought as it was not revealed to the investigation officer in the course of the investigation. Secondly, the ticket that was produced was not proved to be that of the accused. Thirdly, the accused did not carry with him any clothes. Fourthly, the friend of the accused who sent him to the bus station was not called as a witness to support his evidence.

The investigation officer in this case is Kamaruzaman bin Endut (SP4). In his examination-in-chief he was not asked whether the defence of the accused was revealed to him. In cross-examination he said that apart from taking a statement from SP3 he does not remember the other persons from whom he took statements. He denied a suggestion that his investigation was incomplete. When the accused was being cross-examined by the prosecution he denied that he did not show his bus ticket to the police. On these facts I am unable to comprehend how the learned Magistrate could have found that the accused did not reveal the issue of the bus ticket to the police. The finding is not supported by the evidence and cannot therefore be sustained. In any event the failure to disclose a defence only affects its weight and not its admissibility. In the circumstances the learned Magistrate had misdirected herself in holding that the defence advanced is an "afterthought". The finding by the learned Magistrate that it was not proved by the defence that the bus ticket was not that of the accused cannot also be sustained. To require him to call additional evidence to establish that the ticket is his is to cast a heavier burden on him than what is required by law. On the facts of this case the defence advanced has to be accepted or rejected. Thus it would have been different if the learned Magistrate had found that she is unable to accept the evidence of the accused

on the bus ticket. The fact that the accused did not carry any clothes with him was used by the learned Magistrate to support her finding. This overlooks the evidence of the accused who, in answer to a question as to whether he had brought his clothes on that day, said:

> Tidak kerana saya bercadang untuk pulang ke rumah jam 6 petang dan suruh kawan saya hantar ke stesen bas. Nama kawan saya Wan Aziz.

If the learned Magistrate had paid sufficient attention to all the evidence adduced she may have come to a different conclusion. Finally, the learned Magistrate commented adversely on the failure of the accused to call as his witness the friend who sent him to the bus-station. There is no evidence on record to show that the accused was sent to the bus station by his friend. The evidence of the accused is that he had intended to go back home and then ask his friend to send him to the bus station. The finding of the learned Magistrate is therefore contrary to the evidence adduced. In the circumstances the rejection of the defence of the accused by the learned Magistrate cannot be supported in law.

In the upshot I allow the appeal by the accused and quash the convictions and sentences imposed on both the charges. The accused is acquitted and discharged on both the charges.